In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 927

JACK E. FORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 21–25) is not officially reported. The opinion of the court of appeals (Pet. 26–30) is reported at 339 F. 2d 70.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1964. A motion for a rehearing was denied on January 21, 1965. The petition for a writ of certiorari was filed on February 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

771-302—65

QUESTION PRESENTED

Whether a federal tax lien is entitled to priority in a foreclosure proceeding over a judgment obtained before the tax lien was recorded, when the judgment did not, as a matter of State law, create a lien on the property involved in the proceeding.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

> SEC. 6321. LIEN FOR TAXES.
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.
>
> (26 U.S.C. 6321.)
>
> * * * * *
>
> SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.
>
> (a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—
>
> (1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever

the State or Territory has by law designated an office within the State or Territory for the filing of such notice; * * *

* * * * *

(26 U.S.C. 6323.)

Treasury Regulations on Procedure and Administration (1954 Code):

SEC. 301.6323–1 *Validity of lien against mortgagees, pledgees, purchasers, and judgment creditors.*

(a) *Invalidity of lien without notice*—(1) *Filing of notice.* * * *

* * * * *

(2) *Meaning of terms.* (i) As used in section 6323 and this section:

* * * * *

(*b*) The term "judgment creditor" means a person who has obtained a valid judgment in a court of record and of competent jurisdiction for the recovery of specifically designated property or for a certain sum of money and, in the case of a judgment for the recovery of a certain sum of money, who has a perfected lien under such judgment on the property involved. The term "judgment" does not include an inchoate lien, such as an attachment lien, unless and until such lien has ripened into a judgment. United States v. Security Trust and Savings Bank (1950) 340 U.S. 47. Nor does the term "judgment" include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity, such as, for example, the action of State taxing authorities. United States v. Gilbert Associates (1953) 345 U.S. 361; and United

States v. City of New Britain (1954) 347 U.S. 81.

* * * * *

(26 C.F.R. 301.6323–1.)

STATEMENT

On November 15, 1962, and February 19, 1963, the United States filed notices of tax liens in Harrison County, Texas, against the property of taxpayer, Sunset Drilling Company. (Pet. 27). On October 26, 1962, prior to the filing of either notice, petitioner Jack E. Fore had obtained a judgment in a Texas State court against taxpayer. An abstract of this judgment was filed in Harrison County on November 10, 1962, five days prior to the filing of the first tax lien. (Pet. 27). Under Texas law, the filing of an abstract of Fore's judgment gave him a lien upon taxpayer's real property in the county, but did not give him a lien upon taxpayer's personal property. (Pet. 28). Such a lien could be obtained only by attachment or execution, which Fore did not accomplish. (Pet. 29).

The present proceeding is one to foreclose a mortgage upon personal property (cattle) owned by taxpayer. The question raised in the court of appeals and in the petition is the priority in this proceeding as between Fore's judgment and the federal tax liens. The district court held the federal tax liens to be prior, since Fore had not obtained a lien but only a judgment prior to the filing of the federal liens (Pet. 24–25). The court of appeals affirmed for the same reason.

ARGUMENT

Section 6323 of the Internal Revenue Code of 1954 provides that a federal tax lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the" government in the appropriate office. Thus, when a judgment creditor obtains a perfected lien against a taxpayer's property before notice of the federal lien is filed, the judgment lien prevails over the federal lien for the reason that the federal lien, as to the judgment creditor, was not valid until *after* the judgment lien was perfected. The security interest that is first in time is entitled to priority. *United States* v. *New Britain*, 347 U.S. 81, 85. Petitioner contends that he is similarly entitled to prevail over two federal tax liens even though he obtained only a judgment, and not a lien, prior to the filing of the federal tax liens.

As the courts below found, petitioner's argument is fallacious. As its language shows, Section 6323 was enacted merely "to postpone the effectiveness of the tax lien" as against certain interests "until the tax lien was filed." *United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84, 89. The section does not change the requirement that a creditor must obtain a perfected security interest in the property in question before the federal lien is filed in order to prevail over the federal lien; it does not "subordinate the tax lien to tentative, conditional or imperfect state liens." *Ibid.* Therefore, if notice of the federal lien is filed before a judg-

ment creditor obtains a perfected state lien, the federal lien is entitled to prevail as the prior lien.

This result is reflected in the Treasury Regulations (see pp. 3-4, *supra*), and has been uniformly reached in the lower federal courts. In addition to the decisions below in this case, see *Miller* v. *Bank of America, N.T. & S.A.*, 166 F. 2d 415 (C.A. 9); *Ersa, Inc.* v. *Dudley*, 234 F. 2d 178 (C.A. 3); *United States* v. *Leventhal*, 316 F. 2d 341 (C.A. D.C.); *United States* v. *Levin*, 128 F. Supp. 465 (Md.); *Beeghly* v. *Wilson*, 152 F. Supp. 726 (N.D. Iowa); *United States* v. *Morrison* (S.D. Ohio), decided October 22, 1963 (64-1 U.S.T.C., par. 9232). These holdings are not, as petitioner suggests (Pet. 7-8, 14), in conflict with *United States* v. *Gilbert Associates*, 345 U.S. 361. That case gave content to the term "judgment creditor"; it did not suggest that a judgment creditor is entitled to prevail over a federal tax lien even though the federal lien becomes valid prior to the perfection of the judgment lien. Indeed, the Regulations cite *Gilbert Associates* in the same paragraph which states the rule that a judgment creditor must obtain a perfected lien in order to prevail over the federal lien. (See p. 3, *supra*.)

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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